Supreme Court, U.S.
FILED
OCT 30 2000

No. 00-717

In The
Supreme Court of the United States

LESLY JEAN,

Petitioner,

v.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, Individually; JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

I. Whether the Fourth Circuit's holding that Brady v. Maryland, 373 U.S. 83 (1963), is not violated when a police officer fails to ministerially deliver exculpatory, material evidence to the prosecution and, therefore, the officer can never be liable for §1983 damages under Brady for the non-production of such evidence, is in direct conflict with decisions in multiple circuits, fundamentally misconstrues and undermines the Brady obligation and achieves a manifestly unjust result?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lesly Jean, respectfully prays this Court grant a Writ of Certiorari to review the en banc judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on July 31, 2000.

OPINIONS BELOW

The October 13, 1995, opinion of the United States District Court for the Eastern District of North Carolina is reprinted in the Appendix (hereinafter "App.") hereto, p.109.

The March 7, 1997, panel opinion of the United States Court of Appeals for the Fourth Circuit, reported at 107 F.3d 1111 (4th Cir. 1997) is reprinted at App. 88.

The September 17, 1998, en banc opinion of the United States Court of Appeals for the Fourth Circuit is reported at 155 F.3d 701 (4th Cir. 1998) and is reprinted at App.50.

The June 1, 1999, judgment of the United States Supreme Court granting Jean's Petition for Writ of Certiorari and vacating the Fourth Circuit's en banc opinion is reprinted at App.48.

The July 31, 2000, en banc opinion of the United States Court of Appeals for the Fourth Circuit is reported at 221 F.3d 656 (4th Cir. 2000) and is reprinted at App. 1.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit (en banc) in this action issued on July 31, 2000. The jurisdiction of this Court to review the judgment of that court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution as well as 42 U.S.C. §1983. The provisions of both the Amendment and Statute are set out in the Appendix hereto, App. 137-38.

STATEMENT OF THE CASE

A. THE FACTS

On July 21, 1982, at approximately 3:00 a.m., Kathleen Wilson (Wilson) was brutally raped and beaten at her home in the early morning. A police officer arrived, took a very brief description of the perpetrator and immediately broadcast it on the police radio. Wilson's description of her assailant was: a black male with a slight accent, wearing blue shorts and white tennis shoes. Patrolman Shingleton, a respondent in this case, heard the broadcast and stopped a man walking along the highway who fit the description. After a brief encounter, the man fled and was not found again. Shingleton described the man he had seen as a black male with a mustache, close cut hair, approximately five feet, ten inches tall, wearing blue socks, a blue shirt with writing, white socks and white tennis shoes. App.52-90.

Meanwhile, Wilson was transported to the hospital for treatment and then to the police station to make a statement. She also worked with a sketch artist to create a likeness of the perpetrator. The description provided by Wilson did not match, in many respects, that provided by Shingleton. Specifically, Wilson described her attacker as a black male, muscular, five feet, eight inches tall, weighing approximately one hundred sixty five or one hundred seventy pounds with a marine haircut, kinky hair, no facial

hair and wearing dark shorts that were probably navy blue, white socks and high-top sneakers. She also indicated the rapist had small freckles widely scattered over his upper face and forehead as well as a large spot somewhere on his left cheek, slightly larger than the rest of his face and between the size of a dime and nickel. Id. at 52, 90-91. In a subsequent interview of defendant Shingleton, a State agent assigned to the case determined Shingleton could not describe a single facial feature with any confidence and thought the suspect had a beard and maybe a mustache. No composite was taken from Shingleton's description due to the incomplete nature of his observations. Id. at 52-53, 91.

The next day defendant Collins, then head of the Detective Division, decided to hypnotize Shingleton to enhance his memory of the encounter with the suspect on the street. Apparently both officers knew the content of Wilson's description and knew it differed from Shingleton's description, but it is unclear whether they both had also seen the Wilson composite sketch. Id. at 53. The hypnotic session was recorded on audio tape and its results were noted in a hypnosis information worksheet. Id.

Under hypnosis, Shingleton's memory of the possible suspect changed in multiple ways, not the least of which was the facial hair on the suspect's face and writing on his tee-shirt both disappeared, he recalled blue stripes on each of the person's socks and, whereas before he was unable to describe, with any clarity, the suspect's face, he now described the person he had seen as someone with a "baby face" full cheeks, oval jaws, big lips, big nose and eyes that were glassy with dilated pupils as if he had been drinking. Following this hypnotic session, the only notes recorded in the hypnosis log were the description given by Shingleton now "matched the one given by Wilson". Id. at 53 and 91.

A few days after the attack, Chief of Police Roger Halbert was in a Dunkin' Donuts and noticed petitioner, a marine stationed at Camp Lejeune nearby.[1] Believing Jean resembled one of the descriptions, Halbert called Shingleton. Shingleton identified Jean as the man he had seen on the roadside.[2] Jean was placed under arrest, interviewed and, after receiving his consent, his locker and laundry bag were searched at the marine base. A blue tee-shirt, a blue pair of shorts and pair of white sneakers were seized. Jean's shoes were white high-top basketball sneakers with the "Nike" brand name and logo in black, and black stripes on the side with black laces. His shorts were blue with a white border and three white stripes on either side. Socks were found, but they did not match the description. Id. at 53 and 91.

The following day, Detectives asked Wilson to come to the police station to view a photographic line-up that included Jean's photo. She stated none of the pictures were of her assailant, but one photo—not Jean's—made her uncomfortable. She was also showed the clothing taken from petitioner's locker, but recognized nothing. Id. at 91-92.

The next day, Wilson telephoned detectives and asked to see the photographic line-up again. Although Wilson stated petitioner's photograph made her feel sick and another was "haunty", she could not make any positive identification. Id. at 53-54.

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[1]At the time of these events, Lesly Jean was a twenty-two year old, clean shaven black male weighing approximately one hundred fifty-two pounds, five feet, ten inches tall, with no remarkable spots on his face.

[2]Shingleton believes it was the hypnosis that enabled him to make this identification. See Fourth Circuit Joint Appendix (hereinafter "J.A."), pp.590-91, 821-28.

At this point, Collins and Shingleton decided to hypnotize Wilson to enhance her ability to identify her perpetrator's photograph. Once again, the hypnosis was audio taped, but as with the case of Shingleton, the pre and post hypnotic conversations and descriptions were not. Collins again filled out worksheets prior to and after the hypnosis. Id. at 91-92.

Again, as with Shingleton, Wilson's hypnosis produced at least three new pieces of information: Wilson believed her attacker had an accent, possibly Puerto Rican, recalled his shorts were a solid dark color without any stripes and, finally, his shoes were white high-top Nike sneakers with white shoelaces. Wilson further indicated her assailant's eyes were gray and it looked like he had freckles.[3] Id. at 53-54. In the weeks following the hypnosis, Wilson listened to voice exemplars and, after a week's delay and at least four play backs, tentatively selected two possible voices as that of her assailant, including petitioner. After more play backs and delay, Wilson identified Jean's voice. She also picked Jean out of a three-person show-up. Jean was the only person in the show-up previously known to her through the photographic line-up.[4] Id. at 54, 92.

Subsequently, Jean was indicted in October of 1982 for rape and first degree sexual offense. Prior to trial, Jean's counsel filed a discovery motion requesting, inter alia, disclosure of "facts and circumstances" surrounding any pre-trial identification; inspection of recordings tangible to the

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[3]As the panel opinion in this case makes clear, the "hypnosis itself was very suggestive, and during the procedure the officers effectively persuaded Wilson that Jean could have been her assailant." Nonetheless, the validity of the hypnotic procedure is itself not an issue in this case, only the exculpatory nature of the evidence obtained. App. at 91 n.1.

[4]"These two identification procedures were also highly suggestive and unreliable," but are not in issue. Id. at 92 n.2.

preparation of his defense; and results and reports of any physical examinations, tests, measurements, and experiments made in connection with the case. Id. at 55,92. Despite this motion, the state did not inform Jean's counsel the victim had ever seen Jean's photograph prior to the line-up, or that Wilson or Shingleton had ever been hypnotized. Moreover, the state failed to disclose any of the documentation of the hypnoses and how the descriptions had been changed by them. Not until the victim testified under direct examination during trial, did Jean's counsel learn of the hypnosis. Then, even after counsel specifically requested all records and recordings related to the procedures, the state failed to disclose the requested material, denying any existed. Id.

The State's trial evidence consisted of Jean's sneakers, shorts and tee-shirt, a blood test placing him in the same 32% of the population as the rapist and the identification testimony of Shingleton and Wilson. Wilson identified Jean with complete certainty. She repeatedly bolstered her identification by referring to a "freckle" she observed in close detail on her assailant and claimed it was identical to a small black mark on petitioner's face. She claimed to have described the mark to the detectives, but the jury was never informed she actually told the detective the assailant had many small freckles widely scattered over his upper face and forehead and the spot on her assailant's cheek was only slightly darker than the surrounding skin and larger than a dime. J.A. at 526-28, 550, 571-73, 582-84, 734-35, 835-40.

Wilson also positively identified petitioner's shoes as that of her attacker, claiming to have seen the "Nike swirl" when raped. She testified she did not recall the color of the shoelaces nor whether the shorts had stripes, although she identified petitioner's shorts as the ones she had seen her attacker wearing. She testified even at the time of the attack, she thought the attacker had a New York or Puerto Rican

accent and identified petitioner's voice as that of her assailant. Wilson denied the hypnosis had any effect on her memory and the detectives corroborated this by testifying "nothing new" had come out of the hypnosis. Id. at 523, 552-54, 577-78, 659, 702-03.

Shingleton also positively identified petitioner in court. He identified petitioner's clothing as being similar to that of the suspect and offered a new detail of identification– that he recognized the "white trim" on the shorts. He could not remember the color of the shoelaces, but he identified the suspect's accent as "Jamaican". Id. at 597-600, 604-05, 615, 660.

In his own defense, petitioner testified at trial and presented four alibi witnesses. Three marines testified they awakened plaintiff in his bunk or saw him there at the exact time the victim was being assaulted. Jean's platoon commander testified petitioner was required to be on duty at that time and, if Jean had not been present, there would have been a record of his absence, which there was not. Petitioner testified he was in his barracks at the time of the assault.

On December 5, 1982, Jean was convicted on all counts and sentenced to two consecutive life terms. After his direct appeals and applications for state post conviction relief proved unsuccessful, Jean filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of North Carolina. In Jean v. Rice, 945 F. 2d 82 (4th Cir. 1991) (per curiam), App. at 150, the United States Court of Appeals for the Fourth Circuit unanimously reversed a decision of the District Court denying habeas relief and found the State's failure to turn over evidence relating to the hypnosis and other identification procedures violated Brady v. Maryland, 373 U.S. 83 (1963). That court further found the evidence at issue had certainly been material, as most of the non-identification evidence presented at trial tended to exculpate rather than implicate Jean. App. at 93; Jean v. Rice, 945 F. 2d at 87. On that basis, the Fourth Circuit vacated Jean's conviction and

remanded for further proceedings. Upon remand, the State declined to try Jean again and he was released from incarceration after serving nine years in prison.

B. PROCEEDINGS IN THE COURTS BELOW

On May 20, 1994, Jean filed the present complaint against Collins and Shingleton in the United States District Court for the Eastern District of North Carolina, alleging Fourth Amendment and Fourteenth Amendment Due Process Clause violations under 42 U.S.C. §1983 and supplementary state-law claims. The due process claim specifically alleged a violation of Jean's right under Brady v. Maryland, supra, to have exculpatory evidence disclosed to the prosecution.[5] The state law claims were dismissed prior to summary judgment and are not at issue. The District Court, after initially denying respondents' Motion to Dismiss, holding "a police officer's failure to disclose information to prosecutors, which is the conduct alleged in the Complaint, can give rise to liability under Federal law", citing Goodwin v.Metts, 885 F.2d 157 (4th Cir. 1989), cert. denied, 494 U.S. 1081 (1990), subsequently granted respondents' Motion for Summary Judgment, holding, as a matter of law, defendants were entitled to qualified immunity because Jean's right to have the Government disclose exculpatory evidence regarding the changes in identification obtained through hypnotically-enhanced testimony was not clearly established in 1982. App. at 115.

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[5]Petitioner's complaint was supported by affidavits of defense counsel and the prosecution, including statements the prosecutor "was told by [ ] Collins that nothing was generated from the hypnosis", not informed of the existence of any recording, worksheets or data related to the hypnosis sessions and was told "the hypnosis did not materially increase [Wilson's] memory of the event and [ ] did not help identify Jean." App. 145 and 147-49.

A panel of the United States Court of Appeals for the Fourth Circuit unanimously reversed the decision of the District Court in Jean v. Collins, 107 F.3d 1111 (4th Cir. 1997), holding that as of 1982, respondents were "under a clearly defined constitutional duty to disclose" material, exculpatory evidence relating to the hypnosis. Id. at 117; App. 101.

Upon en banc review, the United States Court of Appeals for the Fourth Circuit, in a 6-5 opinion, held respondents were protected by qualified immunity for their failure to turn over exculpatory evidence to the prosecutor in 1982. 155 F.3d at 712; App. 51-52. Specifically, the majority opinion held: (1) in determining whether a right is "clearly established", courts should only review decisions of this Court, the Court of Appeals in which the case arose and the highest court of the state in which the case arose; (2) As of 1982, neither this Court nor the Fourth Circuit had held the police possessed such a constitutional duty; (3) even though police officers in 1982 "could reasonably have expected to be internally accountable to prosecutors for not turning over evidence in their possession", and a failure to turn over exculpatory evidence would violate Brady v. Maryland, supra, "officers had no earthly idea they would be subject to a federal cause of action for money damages [since] no relevant decision had held the police's responsibility to furnish evidence to the prosecution was governed by federal constitutional law"; and, (4) even though decisions existed in other jurisdictions supporting petitioner's claim, those decisions were irrelevant for determining whether or not the constitutional right at issue was "clearly established" for officers in jurisdictions under control of the Fourth Circuit. 155 F.3d at 710-11; App. 62-70.

Three dissenting opinions were filed, the gist of which was that based on decisions of this Court, including Brady v. Maryland, supra and Giglio v. United States, 405 U.S. 150 (1972), as well as decisions of the Fourth Circuit

and other circuits, including, Barbee v. Warden, Maryland Penitentiary, 331 F. 2d 842 (4th Cir. 1964), a reasonable police officer in North Carolina would have known a criminal defendant had a clearly established right to have officers ministerially deliver material, exculpatory evidence to the prosecutor. 155 F. 3rd at 712-18; App. 73-87.

Following a Petition for Writ of Certiorari to this Court, the Court summarily granted the Petition, vacated the Fourth Circuit's en banc opinion and remanded for reconsideration in light of the Court's recent decision in Wilson v. Layne, 526 U.S. 603 (1999). App. 48-49.

On remand, an evenly and hopelessly divided Fourth Circuit (6-6) affirmed the District Court's dismissal of this case in a per curiam opinion. App. 1-47. The six concurring judges held police officers have no independent Brady duty to disclose exculpatory evidence to prosecutors. Id. 5-6. Specifically, the concurring opinion holds "Brady is not violated when a police officer fails, for what ever reason, to produce exculpatory and material evidence to the prosecutor, and therefore, that a police officer can never be held liable under Brady for the non-production of information to the prosecution. In reaching this holding, the concurrence reasons that Brady is violated only when the prosecution fails to provide exculpatory and material information to the defendant." App. 43-44 (Luttig, J., dissenting) (emphasis in original).

The concurring opinion goes on to hold that although Brady is not violated by a police officer's failure to ministerially deliver exculpatory evidence to the prosecution, the Due Process Clause may independently be violated if an officer fails, in bad-faith, to provide exculpatory information to the prosecution. Id. at 7-8, 12. The concurring opinion then finds respondents' failure to disclose in this case was, at best, a "negligent miscommunication" and respondents bear no constitutional responsibility for their actions. Id. at 12.

Two dissenting opinions issued, in the first of which five judges held: (1) Brady v. Maryland, supra, controls disposition of petitioner's claim; (2) Brady, supra, creates a singular constitutional duty, which both prosecutors and police officers may breach in different ways and does not require the disaggregation of the state's prosecutorial team into discrete subgroups; (3) petitioner's Brady rights were clearly violated in the case at bar and he may vindicate those rights in a §1983 damages action against respondents; (4) petitioner's right to exculpatory evidence is protected under the procedural component of the Due Process Clause and is not an independent substantive right divorced from its Brady moorings; (5) petitioner was deprived of his liberty without due process of law when respondents failed to ministerially disclose patently exculpatory evidence to the prosecution thereby denying petitioner a "fair trial"; and, (6) this constitutional violation occurs regardless of the good or bad faith of the non-disclosing official. App. 13-42.

Judge Luttig dissented on grounds that if the Due Process Clause itself provides an independent cause of action for a law enforcement officer's failure to provide exculpatory information to the prosecution, and if that claim requires specific intent, petitioner "has never even had the cause, much less the opportunity, to develop a record with regard to [respondents] state of mind in withholding the evidence". App. 46.

This Petition for Certiorari was filed timely seeking review of the en banc decision of the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's holding that Brady v. Maryland, 373 U.S. 83 (1963), is not violated when a police officer fails to ministerially deliver exculpatory, material evidence to the prosecution and, therefore, the officer can never be liable for §1983 damages under Brady for the non-production of such evidence, is in direct conflict with decisions in multiple circuits, fundamentally misconstrues and undermines the Brady obligation and achieves a manifestly unjust result.

A. The Fourth Circuit's opinion addresses and erroneously negatively answers the fundamental question of whether the police are part of the "prosecution" under Brady v. Maryland.

Over thirty-five years ago, Brady v. Maryland, supra, held, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. See also Kyles v. Whitley, 514 U.S. 419 (1995). Brady is not a discovery rule, but rather one of fairness and minimum governmental obligation, practically recognizing the imbalances inherent in our adversarial system of criminal justice. It is grounded in the constitutional guarantee of due process of law contained in the Fifth and Fourteenth Amendments to the Constitution. See United States v. Agurs, 427 U.S. 97, 107 (1976). "The essence of the Brady rule is the proposition that non-disclosure of material exculpatory evidence violates a defendant's due process right to a fair trial." Smith v. Secretary of New Mexico Department of Corrections, 50

F.3d 801, 823 (10th Cir. 1995). See also United States v. Bagley, 473 U.S. 667, 675 (1985) ("the Brady rule is based on the requirement of due process.")

Thus, as of 1963, when Brady was decided, suppression of exculpatory evidence by the prosecution, material to the outcome of a trial, violated due process irrespective of the motivation behind the suppression. See Smith v. Phillips, 455 U.S. 209, 219 (1982) ("[T]he touchstones of due process analysis in cases [alleging a Brady violation] is the fairness of the trial, not the culpability of the prosecutor"). In addition to the disclosure of purely exculpatory evidence, since at least 1972, due process has also required the Government disclose material evidence effecting the credibility of government witnesses. Giglio v. United States, 450 U.S. 150, 154 (1972).

In the case at bar, however, it is not a prosecutor's decision to withhold exculpatory evidence that is at issue; rather it is the decision of the investigating police officers which is in question. This Court has not explicitly addressed the disclosure duties of police and other investigators under Brady and it's progeny. Nonetheless, although Brady spoke of "suppression by the prosecution", resort to the policies that undergird the Brady obligation establishes, beyond peradventure, the constitutional duty of disclosure falls on the state as a whole, not just the prosecutor.

Factually, there is simply no question but the vast majority of investigations conducted in a criminal case are done by law enforcement officers. Prosecutors may be involved in some investigation in some cases, but that is the exception rather than the rule. For the Brady obligation to have any meaning, it must, of necessity, apply to those who investigate crimes for the state, as much as it does to prosecutors, for if the investigative agents have no obligation to disclose exculpatory evidence to prosecutors, then the prosecutorial obligation to do so will have been rendered a

nullity. "If only the prosecutor were under the command of Brady, the right to a fair trial would depend on the uncertain and uncontrolled decisions of Government investigators." United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1971). Brady's validity, and the due process protection it encompasses, requires the assumption and fulfillment of a corresponding constitutional duty of police to disclose exculpatory information to the prosecutor.

Thus, nearly every circuit in the country, including previous decisions of the Fourth Circuit, have held for Brady purposes, the prosecution "encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office, see [Giglio, 405 U.S. 154], as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture." Smith, 50 F. 3d at 824. See also Sutkiewicz v. Monroe County Sheriff, 110 F.3d 352,356-58 (6th Cir. 1997) ("Even though an officer is not obligated to actively search for exculpatory evidence, when an officer is aware of exculpatory facts and circumstances, he has a duty to disclose those facts and circumstances to the prosecutor."); McMillian v. Johnson, 88 F.3d 1554, 1567-68 (11th Cir. 1996), cert. denied, __ U.S. __, 117 S.Ct. 2514 (1997)("Investigators satisfy their obligations under Brady when they turn exculpatory and impeachment evidence over to the prosecutor."); Walker v. City of New York, 974 F.2d 293, 299 (2nd Cir. 1992)("The police satisfied their obligations under Brady when they turned exculpatory evidence over to the prosecutors."); Sanders v. English, 950 F.2d 1152, 1162-64 (5th Cir. 1992); United States v. Endicott, 869 F.2d 452, 455 (9th Cir. 1989); Martinez v. Wainwright, 621 F.2d 184, 186-7 (5th Cir. 1980); Boone v. Paderick, 541 F.2d 447, 451, (4th Cir. 1976); United States v. Morell, 524 F.2d 550, 555 (2nd Cir. 1975); United States v. Bryant, supra; Barbee v. Warden, Maryland

Penitenitiary,331 F.2d 842 (4th Cir. 1964); Emmett v. Ricketts, 397 F.Supp. 1025, 1040-42 (N.D. Ga. 1975); Imbler v. Craven, 298 F.Supp. 795, 806-07 (C. D. Cal. 1969) (where police fail to make proper disclosure, they participate in constitutional deception and their action are "no less that of the state than the action of a prosecuting attorney."); Walker v. Bishop, 295 F.Supp. 767, 775 (E.D. Ark. 1967); Evans v. Kropp, 254 F.Supp. 218 (E.D. Mich. 1966). Logically, this must follow because the investigative officers are just as much a part of the prosecution and the "taint on the trial is no less if they, rather than the [prosecutors], [are] guilty of the nondisclosure. . . . The duty to disclosure [sic] is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of material information, the state's failure is not on that account excused." McMillian v. Johnson, 88 F.3d at 1569 quoting Freeman v. State of Georgia, 599 F.2d 65, 69 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980).

Despite this obvious conclusion supported by uncontradicted authority from across the country, the Fourth Circuit concurrence cabins the Brady obligation, limiting it only to prosecutors, and holds that although police officers are indirectly subject to Brady, to the extent they should furnish prosecutors with evidence they accumulate, they are not directly subject to Brady because only the prosecutor has ultimate Brady responsibility. Accordingly, when the police fail to disclose exculpatory evidence, Brady "imputes" the non-disclosure to the prosecution and, although subsequent prosecutorial failure to hand over exculpatory evidence to the criminal defendant imperils the criminal prosecution, non-disclosure by the police can never lead to civil liability on their part since no independent Brady duty to criminal defendants by police exists. App. 5-6, 19-24.

As highlighted by Judge Murnaghan's dissenting opinion, multiple problems exist with the Fourth Circuit's conclusion. First, the Circuit itself rejected this formalistic distinction in 1964 in Barbee v. State of Maryland, supra, holding that:

> "Failure of the police to reveal ...material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint of the trial is no less if they, rather than the State's Attorney [are] guilty of the non-disclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, State officers are practicing deception not only on the State's Attorney but on the Court and the defendant. 'The cruelest lies are often told in silence!'"

331 F.2d 846. (citations omitted). Barbee made clear the constitutional injury arising from an officer's non-disclosure runs directly from the police to the defendant and the factual interposition of the prosecutor between the police and the defendant does not transform the prosecutor into a supervening legal cause of constitutional injury. See App. 22(Murnaghan, J., dissenting).

Second, the constitutional obligation imposed by Brady is one imposed upon the "prosecution", 373 U.S. at 86-87, not the "prosecutor". This difference is not a mere technicality. Instead, it reflects a critical understanding that

the "prosecution" encompasses all State actors in the prosecutorial process. Thus, if disclosure of exculpatory evidence is effectively denied by any actor in the chain, including the initial and often primary gatherer of the evidence, the fact that some other actors in the chain may have discharged their portion of the obligation cannot insulate the violation. To allow this to occur would turn Brady on its head. See Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

Third, the Fourth Circuit's opinion cannot be reconciled with dicta from this Court's opinion in Kyles v. Whitley, supra. In that case, Louisiana argued it should not be accountable under Brady for evidence known only to police investigators and not to the prosecutor. Id. 438. This Court refused to accept that argument, criticizing the state's attempt to draw a distinction between the police and prosecutor and rejecting the state's "argument for excusing a prosecutor from disclosing what he does not happen to know." Id. The Court went on to hold the state's Brady disclosure obligation applies even when the prosecutor is kept in the dark because the ultimate injury to the defendant remains the same, regardless of who is to blame. Id. The Court's opinion reaffirms the basic goal of Brady and its progeny is to ensure exculpatory evidence gets into the hands of the defendant and disaggregation of the state's prosecutorial team into neat sub-groups, thereby compartmentalizing the Brady disclosure process, will not be allowed to defeat that aim.

Fourth, as to the concurrence's argument that only prosecutors are trained to make the quintessential legal judgment of whether a piece of evidence is truly exculpatory, and therefore, police officers should not be liable for their failure to recognize or speculate on the exculpatory nature of any evidence, this is "a strawman that confuses the crucial issue". App. 24 (Munaghan, J., dissenting). The argument

erroneously presupposes a police officer's function is the same as that of the prosecutor. Yet, their positions in the administration of criminal justice are entirely different and their acts incommensurable. Prosecutors are required to make the discretionary legal judgment about whether evidence in their possession is exculpatory and must be disclosed. By contrast, the police officer's sole duty is to turn over his investigative file to the prosecution. It is not the officer's primary duty to determine whether evidence is exculpatory--only to gather, record and disclose the evidence he has obtained to the prosecutor. It is a simple function, but one that was not completed in this case.

All that was required at bar to preserve petitioner's right to the disclosure of exculpatory evidence under Brady, was for respondents to walk down the hall with their file and ministerially hand it over to the District Attorney. Yet as the District Attorney's affidavit, at App. 147-49, makes clear, this did not occur.

Furthermore, assuming arguendo a police officer is required to make some basic Brady judgment, the suppressed exculpatory evidence at bar was not highly technical nor was its exculpatory nature subject to dispute. No reasonable police officer needed to be versed in the law to know, for example, that basic description changes in facial appearance or clothing worn by the alleged attacker by the victim and only other eyewitness in the case tends to exculpate a defendant. No evidence is more critical in any criminal case than eyewitness identification testimony. See McDowell v. Dixon, 858 F.2d 945, 949 (4th Cir. 1988). Here, without any other evidence supporting the case against Lesly Jean, his guilt or innocence was wholly dependent on the testimony of Wilson and Shingleton. The police had in their possession evidence which patently could have been used to discredit this testimony. Jean v. Rice, 945 F.2d at 87. Yet, it was not disclosed. A police officer should not be excused for failing to comply with that which he must so clearly do.

Finally, no evidence exists in the summary judgment record in this case, and none has ever been pointed to by respondents, which establishes any case, policy or practice of any law enforcement agency to the effect a law enforcement officer in 1982 could reasonably withhold exculpatory evidence, in the form of changes in identification, from the prosecution. No treatise, police manual or case has ever been cited to that effect and, so far as petitioner has found, none exist. A police officer could no more conceal exculpatory evidence than he could procure false identification by unlawful means. The Fourth Circuit's holding to the contrary simply defies common sense.

B. The Fourth Circuit's determination that the sole remedy for a Brady violation is a new criminal trial and that Brady alone can never provide the predicate for a §1983 claim is incorrect as a matter of law and in direct conflict with opinions from multiple other circuits.

The Fourth Circuit's opinion fails to cite any authority even remotely suggesting that as of 1982, a reasonable officer would not have known a criminal defendant had a clearly established constitutional right pursuant to Brady v. Maryland, supra, to have police deliver material, exculpatory evidence to prosecutors. It further cites no authority for the proposition that a Brady violation may result in the overturning of a criminal conviction, but is "not a sufficient, condition for §1983 liability on the part of the police." App. 12. It cites no authority because none exists.

Every court that has decided the question of whether the police violate Brady by failing to give exculpatory or impeachment evidence to the prosecutor has found a § 1983

cause of action exists. See, e.g., Brady v. Dill, 187 F.3d 104, 114 (1st Cir. 1999) (a police officer may be liable if he fails to apprise the prosecutor of known exculpatory information); Gallo v. City of Philadelphia,161 F.3d 217 (3rd Cir. 1998)(allegedly unlawful actions occurred when the agent sued under §1983 "failed to provide exculpatory material to the prosecutor"); Hart v. O'Brien, 127 F.3d 424, 446-47 (5th Cir. 1997), cert. denied, __U.S.__, 119 S.Ct. 868 (1999) (plaintiff states a §1983 claim against a police officer who, after learning of patently exculpatory evidence, deliberately fails to disclose it to the prosecutor); Sutkiewicz v. Monroe County Sheriff, 110 F.3d at 356-58 ("even though an officer is not obligated to actively search for exculpatory evidence, when an officer is aware of exculpatory facts and circumstances, he has a duty to disclose those facts and circumstances to the prosecutor"); McMillian v. Johnson, 88 F.3d at 1569 (withholding Brady material from the prosecutor, and thus preventing its disclosure to the defense, violates an accused's due process rights and is actionable under §1983); Jones v. City of Chicago, 856 F.2d 985, 992-94 (7th Cir. 1988) (§1983 award against police officers upheld where "street file" written records of police officers' investigatory activities were not provided to either prosecutors or defense counsel and contained exculpatory evidence); Geter v. Fortenberry, 849 F.2d 1550, 1559 (5th Cir. 1988) (police officer cannot avail himself of qualified immunity defense if he deliberately conceals exculpatory evidence from the prosecution); Hilliard v. Williams, 516 F.2d 1344, 1349-50 (6th Cir. 1975), vac'd on other grounds, 424 U.S. 961 (1976) (police violate Brady by failing to give exculpatory or impeachment evidence to the prosecutor); Rhodes v. Smithers, 939 F.Supp. 1256, 1274 (S.D.W.Va. 1995); Lewis v. McDorman, 820 F.Supp. 1001, 1004-06 (W.D.Va. 1992); Carter v. Harrison, 612 F.Supp. 749, 757-58 (E.D.N.Y. 1985)(Brady violations states a cause of action

under §1983 against police officers who fail to disclose exculpatory information to the prosecution); Hauptmann v. Wilentz, 570 F.Supp. 351, 389 (D.N.J. 1983) (a constitutional violation may occur when there is no Brady disclosure because the police have concealed exculpatory evidence from the prosecution). Cf. McDonald v. State of Illinois, 557 F.2d 596, 603 (7th Cir.) cert. denied, 434 U.S. 966 (1977) (plaintiff wrongfully convicted of homicide has §1983 claim for Brady violation where government or agents frustrate his attempts to preserve possibly exculpatory information); Campbell v. State of Maine, 632 F.Supp. 111, 121-22 (D.Me.1985) (noting police officers' duty to give exculpatory evidence to prosecutor), aff'd 787 F.2d 776 (1st Cir. 1986).

Indeed, even the Fourth Circuit had consistently held, prior to this case, that a police officer can be liable under §1983 for a failure to disclose material exculpatory evidence. E.g., Goodwin v. Metts, supra; Taylor v. Walters, 81 F.3d 429, 436 n.5 (4th Cir. 1996); Carter v. Burch, 34 F.3d 257, 264 (4th Cir. 1994), cert. denied, 513 U.S. 1150 (1995). (affirming jury verdict for plaintiff against police officer for Brady violation).

The gist of all of these cases is that "[o]ne standard police function is to provide information to the prosecutor and the courts", Brady v. Dill, 187 F.3d at 114, and a "constitutional wrong results from the officer's failure to deliver material information to competent authorities". Id. The Fourth Circuit's opinion to the contrary, standing alone, constitutes, in dissenting Judge Hamilton's words, "tomfoolery". App. 83.

C. The Fourth Circuit's creation of a new, substantive due process right to exculpatory evidence, independent of Brady, with a heightened §1983 culpability requirement is in direct conflict with this Court's prior opinions in Parratt v. Taylor, 451 U.S. 527 (1981), Daniels v. Williams, 474 U.S. 327 (1986), Graham v. Connor, 490 U.S. 386 (1989) and Arizona v. Youngblood, 488 U.S. 51 (1988).

As Judge Murnaghan's dissenting opinion makes clear, the Fourth Circuit's concurrence creates a second bar to petitioner's §1983 claim: specifically, it implies the non-disclosure of exculpatory evidence must be treated as a tortuous interference with a criminal defendant's liberty interest in exculpatory evidence and not as a procedural defect in defendant's "fair trial" right. App. 41. The concurrence goes on to hold citizens who allege violations of the Due Process Clause must make a threshold showing the due process violation occurred in a culpable, "bad-faith" manner. In addition, although non-disclosure of exculpatory evidence may result in incarceration of a criminal defendant, and this "deprivation" of "liberty" is sufficient to get a conviction reversed, if a criminal defendant seeks money damages thereafter under §1983, he must prove a separate "deprivation" of a different type of "liberty", specifically deprivation of a new substantive right to exculpatory evidence. App. at 5,12,31-32.

In essence, the concurrence utilizes a two-tiered regime. When a criminal defendant seeks only a new trial to address a Brady violation, "no fault" principles apply and the defendant gets a new trial irrespective of the manner in which the due process violation occurred. However, when money damages are sought, a "fault-based" doctrine

mandates the plaintiff establish "bad-faith" of the §1983 actor. Problems with the Fourth Circuit's approach are manifold.

First, this Court has previously rejected the concurrence's two-tiered formulation in Parratt v. Taylor, supra, holding §1983 does not create a heightened culpability requirement above and beyond the culpability required to establish a violation of the underlying constitutional right. 451 U.S. 534.

Second, after Daniels v. Williams, supra, a violation of the Due Process Clause requires proof of two elements: (1) Deprivation by a state actor of the plaintiff's life, liberty or property and, (2) that the "deprivation" occurred "without due process of law." As the dissent argues, the concurrence create two separate definitions of "deprivation" in this case: First, for a criminal defendant seeking to get his conviction reversed for the non-disclosure of exculpatory evidence, the defendant must simply prove the non-disclosure "deprived" him of his liberty interest in not going to jail. App. 31. However, if the criminal defendant seeks §1983 money damages for the same constitutional violation, the go-to-jail "deprivation" is not sufficient. Here the plaintiff must also prove he was deprived of his liberty interest in unfettered access to exculpatory evidence. Id. at 32.

Nothing in this Court's opinion in Daniels v. Williams, supra, countenanced multiple definitions of "deprivation" dependent solely on the nature of the relief sought by the plaintiff/petitioner. No precedent of this Court allows for the chameleon-like changing of the contours of a constitutional right (or rejection of an otherwise established right) solely because it is advocated in a §1983 claim, rather than a habeas or criminal case. See United States v. Lanier, 520 U.S. 259 (1997). "The protections of the Constitution do not change according to the procedural context in which they are enforced - - whether the allegation that

constitutional rights have been transgressed is raised in a civil action or in a criminal prosecution, they are the same constitutional rights." United States v. Reese, 2 F.3d 870, 884 (9th Cir. 1993), cert. denied, __U.S.__, 114 S.Ct. 928 (1994).

Third, to the extent Daniels, supra, requires "bad-faith" in every due process case, this Court has clearly indicated this "bad-faith" requirement means only something that is more than merely negligent - - an act that involves the "willful, intentional use of government power to invade some protected life, liberty or property interest possessed by its citizens". App. 34 (Murnaghan, J., dissenting). See also Paratt, 451 U.S. 548 (Powell, J. concurring) ("a 'deprivation' connotes an intentional act denying something to someone. . ."). Evidence of a willful, intentional act occurred here: the decision not to disclose. No evidence exists respondents wanted to disclose, but forgot to do so; left a message, but it got misplaced; or otherwise negligently failed to communicate with Vatcher. If Petitioner's evidence is believed, respondents chose not to act. Accordingly, the concurrence's "two-tiered formulation of [this] case is analytically indefensible". App. 34.

Fourth, to the extent the Fourth Circuit has recognized some free-standing liberty interest in exculpatory evidence, independent of Brady, supra, this approach is foreclosed by Graham v. Connor, 490 U.S. 386 (1989). There, this Court made clear when a particular constitutional provision "provides an explicit textural source of constitutional protection" against a specific type of government behavior, the specific provision and "not the more generalized notion of 'substantive due process' must be the guide for analyzing these claims." Id. 395. Thus, the Fourth Circuit's re-characterization of respondents' misconduct as a substantive due process violation, when the conduct is already governed by the procedural protections under Brady v. Maryland, supra, is simply unnecessary and incorrect.

Finally, the concurrence's reliance on Arizona v. Youngblood, supra, is equally misplaced. Youngblood held that when police officers lose or misplace exculpatory evidence, no violation of the criminal defendant's procedural due process rights occur unless the act was in "bad faith". Id. 58. In so holding, however, this Court expressly differentiated that circumstance from the Brady paradigm where the state fails to disclose to defendant material exculpatory evidence. In the Brady circumstance, the Court reiterated the due process standard "makes the good or bad faith of the State irrelevant". Id. 51. But, in the Youngblood scenario, the Court held "we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant". Id. (emphasis added). Explaining a primary reason for this disparate treatment, the Court stated when potentially exculpatory evidence is permanently lost, determining the import of the materials whose contents are unknown and often disputed is extraordinarily "treacherous". Id. at 57-58 quoting and citing California v.Trombetta, 467 U.S. 479, 486 (1984). Brady presents no such concern.

Essentially then, following Youngblood, supra, where the state fails to disclose patently exculpatory evidence, the incarceration occurs "without due process of law" regardless of the good or bad faith of the non-disclosing official. See Brady, supra. However, if the state merely loses or mismanages the evidence that might have exculpatory value, the incarceration complies with "due process of law" unless the police mismanagement of the evidence was "in bad faith". See Youngblood, supra. The Fourth Circuit's opinion, quite simply, fails to appreciate this difference. And, the end result is, although Lesly Jean finally persuaded the Fourth Circuit to vacate his conviction

in 1991 because of the Brady violation, he is left without a §1983 damages action for that same violation with no compensation for nine years wrongfully spent in prison. As the late Judge Ervin eloquently stated, speaking for five members of the Fourth Circuit in the first en banc opinion:

> "[T]he real scapegoat in this matter is Lesly Jean. Jean spent nine years in prison for a crime he did not commit because police officers used "hypnosis" to alter the description of the perpetrator of this crime so that it matched Jean's appearance and his clothes. . . [respondents] are without doubt responsible for the mockery of justice that resulted in Jean's nine year confinement. As I have argued, the question before us is whether a reasonable police officer would have known in 1982 that concealing evidence from the prosecutor violated the constitutional rights of a criminal defendant. While qualified immunity should be invoked in every case in which an officer's conduct was arguably within the bounds of the law, in this case, no such argument can be made. The officers' conduct and the prosecution of Jean was reprehensible and a total betrayal of the trust that society places in those whom it empowers to enforce the law. That Jean will not be allowed the opportunity to present his claim to a jury only perpetuates the injustices that have befallen him in the legal process. . ."

App. 81[6].

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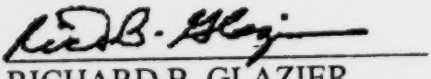
[6] Finally, assuming arguendo, the validity of the Fourth Circuit's opinion that Brady provides no relief, certiorari should be granted and this case remanded for discovery for the reasons set forth in Judge Luttig's dissent.

CONCLUSION

The issues presented in this case merit consideration by this Court. No collateral issues exist which will complicate the Court's treatment of the case and lengthen the proceedings. The case at bar presents a series of critical questions regarding a police officer's obligation under Brady v. Maryland, supra, and, as well, dramatically erodes the constitutional protections afforded by Brady. If the Fourth Circuit's opinion is allowed to prevail, a serious conflict will exist in the circuits, a wholly unnecessary, new substantive right under the Due Process Clause will have been created and a new element for §1983 Due Process Clause claims will have been grafted. Accordingly, petitioner respectfully requests a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit issue to review the decision below.

Respectfully submitted, this the 30th day of October, 2000.

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